No. 78-1319

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF SOUTH DAKOTA, PETITIONER

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-27) is reported at 587 F. 2d 915. The opinion of the district court (Pet. App. 11-18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1978. The petition for a writ of certiorari was filed on February 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Transportation may withhold 10% of the State's share of federal highway

aid funds pending his final determination under 23 U.S.C. 131(*l*) that the State has failed effectively to control outdoor advertising.

STATEMENT

1. The Highway Beautification Act of 1965, 23 U.S.C. 131 *et seq.*, was enacted to preserve and enhance the safety, recreational value and scenic beauty of the nation's highways. 23 U.S.C. 131(a). The Act establishes limitations on outdoor advertising adjacent to the interstate and federal primary highway systems. If the Secretary of Transportation determines that a state has failed to provide the "effective control" of outdoor advertising required by 23 U.S.C. 131(b), the Secretary may reduce by 10% the state's allocation of federal highway aid funds and redistribute those funds to other states. 23 U.S.C. 131(*l*). The Secretary has discretion, however, to suspend this penalty "[w]henever he determines it to be in the public interest * * *." 23 U.S.C. 131(b).

At least 60 days before the Secretary makes a final determination that a state has not complied with the Act, the Secretary must give the state written notice and a statement of reasons for his proposed determination. 23 U.S.C. 131(*l*). The state is then afforded an opportunity for a hearing before the Secretary issues a written order setting forth his final determination. *Ibid.* The state may appeal the Secretary's final order to any federal district court in the state. Once the state has filed a notice of appeal, the Secretary's order is stayed "until final judgment has been entered on such appeal." *Ibid.* If any part of a state's highway aid apportionment is withheld by the Secretary, the amount withheld cannot be reapportioned to other States as long as the appeal is pending. *Ibid.*

2. In the summer of 1976 the Supreme Court of South Dakota invalidated the South Dakota statute that regulated outdoor advertising. *Hogen* v. *South Dakota State Board of Transportation*, 245 N.W. 2d 493 (S.D. 1976).[1] As a result, the state lacked any effective statutory control over off-premises outdoor advertising, and the Secretary urged the State to pass legislation that would bring the State back into compliance with 23 U.S.C. 131(b). The state legislature considered several corrective legislative proposals, and the Secretary gave his advice about the adequacy of the bills. In April 1977 South Dakota enacted a statute that the Secretary had informed the State would not satisfy federal requirements (Pet. App. 23).

On July 11, 1977, the Secretary formally notified the Governor of South Dakota of his preliminary determination that the State was "not providing for the effective control of outdoor advertising" and that 10% of the State's federal highway aid apportionment for the next fiscal year would be withheld pending a final determination of non-compliance pursuant to 23 U.S.C. 131(*l*) (Pet. App. 23). Beginning October 1, 1977, 10% of the State's federal highway aid apportionment was withheld.

A formal evidentiary hearing was conducted at the State's request, pursuant to 23 U.S.C. 131(*l*). After this hearing, and before the administrative law judge submitted a recommended decision to the Secretary, the State filed this action for injunctive and declaratory relief. The State claimed that the Secretary lacks authority under the Act to withhold 10% of the

[1]The court concluded that the state statute unconstitutionally delegated legislative authority to a state officer. 245 N.W. 2d at 496.

State's apportionment prior to a final administrative decision of non-compliance.[2]

3. The district court denied the State's request for relief, and the court of appeals affirmed (Pet. App. 19-27). The court of appeals held that 28 U.S.C. 315, which authorizes the Secretary to adopt regulations to implement the Act, provides the Secretary ample discretion to adopt reasonable procedures to ensure compliance with the Act, such as the temporary withholding of the 10% penalty pending completion of administrative proceedings pursuant to 23 C.F.R. 1.36 (Pet. App. 24-26). The court concluded that an interim withholding of the penalty was necessary because otherwise "the State could obligate monies to which it may not be entitled because of its noncompliance with the Act, and thereby effectively nullify the penalty provisions contained in section 131(b)" (Pet. App. 25). Moreover, unlike a permanent withholding of funds, the effect on the State is minimal "because the amount temporarily retained still remains available to the State if the Secretary makes a final determination of the 'effective control' question favorable to the State. Therefore, without causing undue prejudice to the State, the Secretary's interim withholding properly preserved the status quo pending the outcome of the hearing" (*id.* at 26).

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[2]At the same time, South Dakota filed an action challenging the constitutionality of the Highway Beautification Act. *South Dakota v. Adams*, Civil No. 77-3039 (D. S.D.). That action is pending.

On November 9, 1978, the Secretary rendered a final determination adverse to the State and permanently withheld that share of the State's apportionment that had been subject to the temporary reservation. In the "public interest," however, the Secretary suspended until March 31, 1979, application of the 10% penalty with regard to later apportionments. South Dakota has appealed from the Secretary's final determination, and that appeal is pending. *South Dakota* v. *Adams*, Civil No. 78-3051 (D. S.D.). On March 13, 1979, South Dakota passed legislation that the Secretary has concluded provides for "effective control."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

1. The temporary withholding of 10% of the State's share of federal highway aid funds was based on a preliminary determination that the State was not in compliance with the requirements of 23 U.S.C. 131(b). When such a determination is made, the Administrator of the Federal Highway Administration is authorized by regulation to "withhold approval of other projects in the State, and take such further action that he deems appropriate under the circumstances * * *." 23 C.F.R. 1.36. Pursuant to this regulation, a determination was made—and approved by the Secretary—that a portion of the State's share of highway aid funds should temporarily be withheld pending completion of final administrative proceedings under 23 U.S.C. 131(*l*). The court of appeals correctly concluded (Pet. App. 24-27) that the regulation, and the decision under the regulation to withhold funds pending the final administrative ruling, are authorized by the Act.

23 U.S.C. 315 provides the Secretary broad authority to adopt "all needful rules and regulations for the carrying out of the provisions of [the Act]." Although the statute does not expressly authorize the Secretary to withhold funds temporarily pending completion of administrative proceedings under 23 U.S.C. 131(*l*), the statute does not preclude such action. In this context,

the Secretary reasonably determined that such temporary action is necessary to promote the objectives of the Act by protecting the integrity of the enforcement scheme. See *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 373 (1973). The temporary reservation of funds prevents the State from obligating appropriations that may, on the final determination of non-compliance under 23 U.S.C. 131(*l*), be permanently withdrawn from the State's allocation. The temporary reservation does not, however, interfere with any of the State's procedural rights under the statute. The Secretary cannot permanently withdraw the funds until a final determination of non-compliance is made after notice and a hearing under 23 U.S.C. 131(*l*), and the reserved apportionment cannot be reallocated to complying states until judicial review of the final determination is completed. *Ibid.* The purpose of the temporary reservation is thus simply to preserve the status quo and protect the integrity of the enforcement scheme pending exhaustion of administrative and judicial proceedings.

2. Petitioner's reliance (Pet. 9) on *CAB* v. *Delta Airlines*, 367 U.S. 316 (1961), *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), and *SEC* v. *Sloan*, 436 U.S. 103 (1978), is unwarranted.

In *Delta Airlines* the Court held that the CAB could not alter a carrier's certificate without notice and hearing when the applicable statute provided that a certificate may be altered "after notice and hearings," 49 U.S.C. 1371(g). 367 U.S. at 323-334. The Secretary's action in the present case is not, however, inconsistent with any express statutory command. To the contrary, as we have shown above, it is designed to protect the efficacy of the statutory enforcement scheme.

The decision in *Seatrain Lines* is similarly inapposite. The Court held there that the ICC could not modify a water carrier's certificate because the agency had no statutory authority to do so and the legislative history supported the conclusion that such authority had been intentionally withheld by Congress. 329 U.S. at 430. Here, by constrast, the Secretary has been given broad powers to adopt regulations to promote the purposes of the Act, and there is nothing in the legislative history to suggest that the challenged action conflicts with any intended limitation on that authority.

Finally, in *SEC* v. *Sloan* the Court held that the agency could not pyramid successive 10-day ex parte suspension periods to foreclose indefinitely trading in a security without affording notice and a hearing. The Court noted that the statute limited the duration of summary suspension orders to "a period not exceeding ten days * * *," 15 U.S.C. 78*l*(k), and thus failed to provide a "clear mandate" for the exercise of an "awesome power" to continue summary suspension indefinitely. 436 U.S. at 111-112. In this case, however, the Secretary's temporary action does not threaten any "devastating impact" (*id.* at 112) on the State—on completion of the administrative proceedings after notice and hearing under 23 U.S.C. 131(*l*), the temporary action ceases to have any effect. The funds will be either restored to the State's allocation or permanently withheld if, as here, a final determination of non-compliance has been made. During the ordinarily brief life of the temporary order,[3] the order merely preserves the status quo by preserving the funds that are the subject of the final order.

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[3]The final determination of non-compliance may be made within 60 days from the first notice to the State. Proceedings may

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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be prolonged in some cases, however, where non-compliance is challenged by the state and substantial evidence is presented at the hearing.

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